***United States Court of Appeals***

***for the Second Circuit***

# PETITIONER'S REPLY BRIEF

75 4021

In the

UNITED STATES COURT OF APPEALS
For the Second Circuit

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS (No. 75-4021); WARNER BROS. INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA INC. and TWENTIETH CENTURY-FOX TELEVISION (No. 75-4024); SANDY FRANK PROGRAM SALES, INC. (No. 75-4025); WESTINGHOUSE BROADCASTING COMPANY, INC. (No. 75-4026); CBS, INC. (No. 75-4036),

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Respondents,

NATIONAL BROADCASTING COMPANY, INC., et al.,

Intervenors.

# REPLY BRIEF OF PETITIONERS WARNER BROS. INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA INC., TWENTIETH CENTURY-FOX TELEVISION and INTERVENORS NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS and LORIMAR PRODS.

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# REPLY BRIEF OF PETITIONERS WARNER, COLUMBIA PICTURES, MGM, UNITED ARTISTS, MCA and TWENTIETH CENTURY and INTERVENORS NCITP and LORIMAR

This is a reply to the briefs of the FCC, the Justice Department, ABC and NBC and an answer to the briefs of NAITPD, CBS, Westinghouse and Frank on this expedited consolidated appeal.

The first four parties defend PTAR III in its entirety. The latter four support the basic rule and merely attack three of its program exceptions (namely, those for children's programs, documentaries and public affairs).

In contrast, we urge that the entire rule -- with or without those exceptions -- violates the First Amendment and the Communications Act. In the four years it has been in effect, the rule has failed in its goal of increasing diversity of choices for viewers. Indeed, it has had the opposite effect. Having failed to serve the public's paramount interest in diversified programming, the rule stands as an indefensible infringement of the First Amendment rights of viewers, broadcasters and producers.

In recognition of the rule's failure, the Commission has attempted a reform which is also unconstitutional. The program classification system in PTAR III -- the aforesaid three exceptions, the other program preferences (e.g., Lawrence Welk, game shows, "truly special" programs), and the total bans on the most popular motion pictures and TV series -- are all blatant violations of the First Amendment. Since the new program classification system is the Commission's raison d'etre for continuing PTAR, the entire rule must fall.

Finally, PTAR must be repealed because it violates its goal and the FCC's statutory mandate to curb network

dominance. If there were ever any doubt on this score, it is dispelled by the fact that all three networks now support this supposed anti-network rule.* This paradox is not explained in the opposing briefs.

## I

## THE OPPOSING BRIEFS CONFIRM THAT PTAR VIOLATES THE FIRST AMENDMENT BY DECREASING DIVERSITY

None of the opposing briefs refutes the statistical demonstration in our principal brief (pp. 3, 12-18) that PTAR has drastically decreased the diversity of program choices for the public for four years -- it has led to an increase in game shows in the early-evening access entertainment period from 11% to 66% and a decrease in varied dramas and comedies to virtually zero.** While the FCC did not specifically direct that only game shows be telecast, PTAR created economic imperatives which had the same "chilling" effect.

Suggestions by the rule's defenders that Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), gave a permanent seal of approval to PTAR are incorrect. This Court recognized in both Mt. Mansfield (442 F.2d at 479) and NAITPD v. FCC, 502 F.2d 249, 252 (2d Cir. 1974), that it would revisit

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* CBS attacks only the three exceptions to PTAR III noted above (CBS Brief, at 14 n. 14).

** The Commission specifically found that our statistics on the decline of diversity were tne most accurate and complete in the record. 44 F.C.C. 2d 1081, 1138 & n. 39, 1152-53.

the constitutional implications of PTAR in the light of the rule's actual experience under the teaching of Red Lion:

> "[I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969))

As shown in our principal brief (pp. 14-18, 22), the FCC repeatedly conceded in last year's Report and brief that PTAR had in practice significantly decreased diversity for millions of Americans. Since that erosion of diversity has admittedly grown worse in the past year, the FCC advances no cogent reason for continuing PTAR. Indeed, the rationales proferred in the instant Report each condemn PTAR and are not seriously defended in the FCC's present brief:

(1) The principal legal rationale of the instant Report is that the FCC is not permitted by law to consider diversity of programs (¶ 20; also see ¶ 16).* That is clearly erroneous as a matter of law. In its Mt. Mansfield brief, the FCC told this Court that "achievement of diversity is the imperative behind these rules" (at 66). The Commission's public interest mandate, in the words of Judge Learned Hand,

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* All paragraph references ("¶") herein, unless otherwise indicated, are to the Report and Order released January 17, 1975, FCC 75-67 (Docket No. 19622).

"demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public." National Broadcasting Co. v. United States, 47 F. Supp. 940, 945 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943). Indeed, PTAR was passed for that specific purpose. The FCC's present brief does not seek to defend the Report's principal rationale -- i.e., the professed inability of the FCC to consider diversity.

(2) The Report also claims that an increase in the variety of programs for viewers was only a "hope" and that PTAR's main goal was to increase program sources (¶ 14). That rationale is also erroneous as a matter of law and fact (see our principal brief, pp. 21-22). The FCC's brief repeats that rationale (p. 19). But last year's FCC brief in NAITPD stated (at 25): "Regardless of how many new producers the access rule may have made available, the disappointing fact is that this has not resulted in diversity of program choices to the public."

A rule that erodes diversity of choices for millions of Americans at home every night -- even if it had stimulated the entry of a few more game show entrepreneurs -- could hardly be squared with the public's "paramount" First Amendment right to the widest diversity of programs and ideas. Indeed, in its

Mt. Mansfield brief, the FCC said diversity was PTAR's "imperative" (at 66). It is also the First Amendment's imperative.

But now, the FCC calls the public's choice of programs just a "secondary goal" and finds some solace in the fortunate fact that there is "not a total lack of diversity in access programs" (pp. 45-46). This stands First Amendment priorities on their head. Indeed, the FCC itself cannot seriously play this game for long since it cuts against all public interest criteria and values of an open society. Thus at various points in its brief (pp. 47, 53, 55), as in its present Report (¶¶ 21, 29, 33), the FCC itself talks of the need to stimulate diversity of choices for the public. That, of course, is what the public interest and First Amendment dictate. And that is what PTAR has frustrated for four years.

(3) The FCC's present Report (¶ 18) also justifies continuing PTAR by speculating that perhaps four years is not a sufficient test period. Refusing to repeat its past predictions that PTAR will some day increase diversity, the FCC instead shifts the burden of proof to PTAR's opponents to establish that the economic imperatives which led to a four-year erosion of diversity will not inevitably continue. That is an erroneous legal standard, as shown in our principal brief (pp. 22-25). The FCC's brief is silent on this

point. The FCC itself must make affirmative findings of substantial benefits for viewers. It obviously cannot do so here in light of PTAR's track record.

(4) The Report, as shown in our principal brief (pp. 56-63), advances a hodge-podge of specious new rationales for PTAR. The principal one is that PTAR facilitiates locally-produced programs. But this has been minuscule (2% to 4% of access time) and hardly counterbalances a massive overall decrease in diversity, caused by 66% game shows. Continuing PTAR on the theory that it may facilitate a handful of local shows, while simultaneously causing pervasive erosion of diversity in the bulk of access time, is not a permissible trade-off under the First Amendment. This is an unconstitutional theory, as shown in our principal brief (pp. 58-59), under the First Amendment's "over-breadth" doctrine. The FCC's brief is silent on this point.

(5) The leitmotif in the FCC's brief is that PTAR needs more time because of the "uncertainties" surrounding its existence -- alleged uncertainties created by the FCC itself because of its displeasure with the rule. But it is economics, not uncertainties, that led to a deterioration of diversity. Stations which can flood the airwaves with inexpensive game shows (which carry double commercials) obviously have no incentive to change that lucrative

pattern.* "Generalities unrelated to the living problems of radio communications of course cannot justify exercises of power by the Commission." National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943). A year-by-year analysis of the four access seasons plus plans for the forthcoming season (Appendix A hereto) gives a hollow ring to the facile excuse that PTAR needs more time because of "uncertainties" surrounding its fate.

The FCC cannot experiment endlessly with sensitive First Amendment rights.

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* For example, NAITPD's leader, Goodson-Todman, explained the facts of access life at the Commission's hearings (Tr. 90):

> "MR. WILEY: Would you acknowledge another reason why game shows proliferate to some degree in the access hour, is it simply economics?
>
> "MR. CHESTER [Executive Vice President of Goodson-Todman]: Certainly."

Although in 1970 Goodson-Todman had promised the FCC that it would create varied access shows (A 158-59), it thereafter produced only game shows. (References to "A" are to the appendix filed by Warner, et al.)

## II

## THE OPPOSING BRIEFS CONFIRM THAT THE NEW CLASSIFICATION SYSTEM FOR PREFERRED AND TABOO PROGRAMS -- THE SINE QUA NON FOR PTAR -- IS UNCONSTITUTIONAL AND TAINTS THE ENTIRE RULE

Nobody claims that Mt. Mansfield sanctioned the new program precensorship system in PTAR III described in our principal brief (pp. 26-38) -- a system which, for example, bans the most popular motion pictures and TV programs and, instead, prefers Hee Haw, Bowling for $$, and certain types of programs which the FCC believes are good for the public. Nor do the opposing briefs make a serious attempt to defend these program-content rules under the First Amendment.

Indeed, the game show entrepreneurs (NAITPD and Frank) and large broadcasters (CBS and Westinghouse) attack three of the program exceptions as unconstitutional -- namely, those for children's specials, documentaries and public affairs programs. We agree that those categories are unconstitutional. But the aforesaid parties ignore equally illegal and even more odious program categories in PTAR III, including the flat ban on motion pictures if they ever played on a network (i.e., the most popular features) and the suppression of popular dramatic and comedy series if they ever played on a network (even though independently produced and owned). The aforesaid PTAR proponents request this Court to invalidate the three program categories that happen to offend them and to continue the rest of the rules. But all the new program preferences and taboos are part and parcel of the FCC's

pervasive and integrated regulatory scheme. Indeed, the classification scheme is the keystone for the new regulatory package. The FCC would not have continued PTAR without all those program categories. It said so.*

Because all the categories of favored and disfavored programs are illegal forms of prior restraint and precensorship, the entire rule must fall. The law is clear that courts will not dissect a complex regulatory scheme of an administrative agency or legislature and strike certain key provisions and uphold the balance of the scheme. This would place the Court in the impermissible role of rule-making for the agency. See, e.g., Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618-19 (1944); FPC v. Idaho Power Co., 344 U.S. 17, 20 (1952); National Association of Motor Bus Owners v. FCC, 460 F.2d 561, 565-66 (2d Cir. 1972); cf. NLRB v. Food Store Employees, Local 347, 417 U.S. 1, 10 (1974); Lynch v. United States, 292 U.S. 571, 586 (1934).

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* The majority of four Commissioners state in the principal opinion (¶ 48): "If we did not believe that we had the authority to make these modifications, we would then give further consideration to the advisability of continuing the rule." Chairman Wiley states in his separate opinion: "Without these modifications, however, I would vote for repeal." Commissioner Reid states in her opinion: "... I believe the final package represents as good a solution as possible to the immediate issues before us, but I would hope, even expect that we would not revisit this rule unless it is for the purpose of repealing the PTAR." Commissioner Robinson, dissenting, favored total repeal.

For example, in the Addison case, supra, where the Supreme Court found invalid a portion of a regulation promulgated by the Administrator of the Fair Labor Standards Act, it held that the entire regulation must fall:

> "We agree therefore with the Circuit Court of Appeals in holding invalid the limitations as to the number of employees within a defined area. But we cannot follow that Court in deleting this part of the administrative regulation and, by applying what remains of the definition, exempting Holly Hill's employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall. We can hardly assume that the Administrator would have defined "area of production" merely by deleting the employee provision, had he known of its invalidity. It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for us to write a definition. That is the Administrator's duty." (322 U.S. at 618-19)

Similarly, in the Idaho Power case, supra, the Supreme Court declared:

> "[T]he guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." (344 U.S. at 20)

The FCC's brief fails to justify the new classification system, euphemistically called "selective restraint",

under the First Amendment. It merely asserts that the special exemptions (but never on Saturday) for network and off-network children's programs, documentaries and public affairs are "permissive" -- that no station is forced to broadcast them -- and so there can be no First Amendment problem. But that misses the point. PTAR III prohibits stations from carrying all network or off-network programs except those which the FCC in its wisdom decides fall within one of those vaguely defined categories based on its subjective judgment. That is the type of censorship condemned by this Court in Mt. Mansfield (442 F.2d at 480 & n. 32).

Moreover, while focusing only on the aforesaid three so-called "permissive" program categories, the FCC's brief ignores the fact that PTAR III also contains other unconstitutional program provisions. Some prohibit programming material, including popular motion pictures and TV series; other provisions prefer certain programs (Welk, Hee Haw, "truly special" programs and, of course, game shows) (see our principal brief, pp. 26-46). The FCC's brief does not mention these preferred and taboo programs. This discriminatory feature of PTAR III violates the First Amendment, the Equal Protection Clause, and the anti-censorship provision of the Communications Act.

That violation is dramatically demonstrated by the FCC's February 19, 1975 Report to Congress on the Broadcast of Violent, Indecent and Obscene Material (FCC 75-202; 30159). That Report, supporting voluntary industry self-regulation instead of FCC rules, states (pp. 2-4):

"With respect to the broader question of what is appropriate for viewing by children, the Commission is of the view that industry self-regulation is preferable to the adoption of rigid governmental standards. We believe that this is the case for two principal reasons: (1) the adoption of rules might involve the government too deeply in programming content raising serious constitutional questions, and (2) judgments concerning the suitability of particular types of programs for children are highly subjective. As a practical matter, it would be difficult to construct rules which would take into account all of the subjective considerations involved in making such judgments. We are concerned that an attempt at drafting such rules could lead to extreme results which would be unacceptable to the American public.

"Administrative actions regulating violent and sexual material must be reconciled with constitutional and statutory limitations on the Commission's authority to regulate program content. Although the unique characteristics of broadcasting may justify greater governmental supervision than would be constitutionally permissible in other media, it is clear that broadcasting is entitled to First Amendment protection. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC,,395 U.S. 367 (1968); United States v. Paramount Pictures, 334 U.S. 131 (1948). Congress expressed its concern that the Commission exercise restraint in the area of program regulation by enacting section 326 of the Communications Act which specifically prohibits 'censorship' by this agency.

* * *

"In light of the constraints placed on the Commission by the Constitution and section 326 of the Communications Act, the Commission'walks a tightrope between saying too much and saying too little' when applying the public interest standard to programming. Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1967); Columbia Broadcasting System v. Democratic National Committee, supra. For this reason, the Commission has historically exercised caution in the area of program regulation.

* * *

> "Government rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium."

The FCC's brief attempts to quiet fears about heavy-handed censorship (pp. 64-66). But those attempts are hollow in light of the recent remarks of the Chief of the Commission's Office of Network Study who reportedly stated that:

> "... the FCC would be monitoring stations for abuses of PTAR III and that the Commission would not permit anything so blatant as the stripping of old Lassie's."*

That ominous harbinger of bureaucratic censorship cannot be reconciled with the First Amendment principles emphasized in the Commission's recent Report to Congress.

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* Broadcasting, February 17, 1975, p. 30.

## III

## THE OPPOSING BRIEFS FAIL TO JUSTIFY CENSORSHIP OF POPULAR MOVIES AND TV SERIES

The FCC's brief makes no attempt to defend PTAR III's suppression of all popular motion pictures and all popular TV series *if* they ever played even once on a network even though created by independent producers with no ties to any network. These prohibitions, not even discussed in the FCC's brief, are part and parcel of the illegal classification system discussed above in Point II. But these prohibitions deserve special comment because they are so egregious, suppressing enormous categories of diverse entertainment material not controlled by the networks. Motion pictures like *A Man For All Seasons* and *The Sting* are made independently of the networks and at great risk. And television series broadcast on the networks are generally made by independent producers -- both small and large creative forces -- producers who are just as "independent" of the networks as NAITPD's Goodson-Todman which produces sixth and seventh episodes for access of its game shows stripped on network daytime television.

Not one of the opposing briefs seeks to explain the legality or logic of banning *The Ten Commandments* or *Lassie*, and simultaneously favoring *Let's Make a Deal*,

Hee Haw or Walt Disney. Such prior restraints and discriminations, totally arbitrary and capricious, are unprecedented in our nation's history.

That is highlighted by two of the cases repeatedly cited by PTAR's proponents -- Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), and Winters v. New York, 333 U.S. 507 (1948). In those cases, the Supreme Court declared:

> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." (343 U.S. at 501)

* * *

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusem nt, teaches another's doctrine." (333 U.S. at 510)

The suggestion by PTAR defenders that Mt. Mansfield sanctioned the new motion picture ban is incorrect. The Court there merely upheld a restriction against the telecasting of feature films shown within the prior two years in a market in the context of an experimental rule intended to create diversity. Moreover, any restrictions on motion pictures or TV series upheld on an experimental basis four

years ago (which, we respectfully submit, were unconstitutional then) can certainly not be justified today on any conceivable basis in view of PTAR's steady erosion of diversity by a flood of cheap game shows.

The new motion picture prohibition and ban on off-network programs, furthermore, are now integral parts of the entire illegal program classification system which infects PTAR. Far from approving this type of regulatory scheme, Mt. Mansfield warned the FCC against becoming a "censoring agency" (422 F.2d at 480).

The FCC's brief, as noted above, does not even discuss the change in the motion picture rule -- a change from a restraint on motion pictures shown within two years by local stations to a flat ban on any motion picture that played on a network (i.e., the most popular films). Its silence on this point is telling, particularly since elsewhere in its brief the FCC claims that PTAR III "does not bar the licensee from carrying any kind of programs whatsoever" and has not "prohibited the broadcast of any kind of programs" (p. 59). That is simply not true. PTAR III now bans the most popular motion pictures from access.

It thus raises the problem referred to in the Red Lion opinion quoted in the FCC's brief (p. 58): "There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program" (395 U.S. at 396). The Supreme Court recognized that such a

prohibition would raise "serious First Amendment issues" (ibid.).

The drastic change in the motion picture ban, which ABC euphemistically calls a "refinement" (p. 24), is not defended by anyone. ABC makes a half-hearted attempt by arguing (pp. 24-25):

> "... PTAR III is more directly and logically related to the objective of opening up one hour per night for programming which has no network connection, present or past. While this is a somewhat stricter limitation in the case of some feature films, it is less strict for those films which have recently, within two years, appeared in the market and which are not off-network."

This is nonsense. Motion pictures are made independently of the networks at great risk. And the impact of PTAR III is to prohibit the most popular films in access time and to allow the least popular. That is totally arbitrary and capricious and a gross violation of the First Amendment. No wonder the FCC's brief is mute on this point.

## IV

## THE OPPOSING BRIEFS CONFIRM THAT PTAR INCREASES NETWORK DOMINANCE CONTRARY TO ITS GOAL AND THE FCC'S STATUTORY MANDATE

If there were ever any doubt about the fact that PTAR has increased network dominance, it is dispelled by the fact that all three networks now support this supposed anti-network rule. Indeed, the ABC brief states (p. 4) that PTAR "has had beneficial effects for ABC (and may well have been beneficial for the other networks as well)."*

The mercurial change in position of the networks should be dispositive. Their present posture confirms the conclusions of all the disinterested economists who studied this subject -- the Pearce Report (A 164-331), the OTP Report (A 528-31), the Coleman Report (A 536-58) and the Tucker Anthony Report (A 554-96). They all conclude that PTAR has intensified network dominance (see our principal brief, pp. 47-54). Yet, the FCC's new Report inexplicably attaches no weight to the networks' change in position or to those Reports. And the FCC's brief is strangely silent about the paradox of PTAR's intended targets becoming its champions.

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* NBC, after filing a petition to repeal PTAR in 1972 -- one of the petitions leading to the present rule-making proceedings -- told the FCC in 1973 that "we are not as offended by the rule as we used to be" (Tr. 376). CBS, an original PTAR opponent, now carefully "limits" its objection to the exceptions in PTAR III for children's programs, documentaries and public affairs (CBS Brief, at 14 n. 14).

Although the FCC has been preoccupied with the problem of network dominance for more than three decades and passed PTAR to decrease network dominance and although the rule back-fired and strengthened the networks' power, the FCC's present Report devotes only a single paragraph to this important topic (¶ 23). And that paragraph is a mass of ambiguities and vacillating statements.

Thus, while the FCC concedes that PTAR increases network power over independent program producers (whom it found oppressed by network leverage in 1970), the FCC now says that it does not know precisely "how much" PTAR has aggravated this "undesirable" situation and would prefer delegating this perplexing problem to the Justice Department (¶ 23). But the Justice Department, in a three-page letter to the FCC (JA 079),* stated that it could not reach a definitive conclusion about PTAR's impact on network dominance because "empirical evidence is not yet reliable in this matter ... [and] all the relevant factors have not been adequately examined." This creates another anomaly: The FCC suggests that, because it cannot decide "how much" PTAR has increased network power over program producers, the matter should be resolved by the Justice Department. But the Department, in turn, states that "all the relevant factors have not been adequately examined." That is certainly a

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* References to "JA" are to the Joint Appendix.

curious way for the FCC to fulfill its own statutory mandate to further competition and to evaluate the impact of its own rules.

The position of the Justice Department, criticized in NAITPD (502 F.2d at 256), should be placed in perspective. Although the Department originally supported PTAR in 1970 in the hope that it would alleviate network dominance and abuses, it later concluded that these anti-competitive problems had persisted. So in 1972, the Department filed antitrust actions against the three networks, similar to antitrust suits commenced in 1970 by most of the motion picture companies against two of those networks.* The three networks then claimed that the Department's participation in these PTAR proceedings barred prosecution of the antitrust actions under the doctrine of primary jurisdiction. Those defenses, ultimately rejected by the Court,** have recently been reasserted by the networks in newly-filed answers. In any event, after filing its antitrust actions, the Justice Department did not

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* Columbia Pictures, et al. v. ABC, CBS, et al., 70 Civ. 4202, S.D.N.Y.

** United States v. National Broadcasting Co., 1974-1 CCH Trade Cas. ¶ 74,885 (C.D. Cal. 1973).

participate at all in these administrative proceedings. It is thus particularly ironic that the FCC now seeks to pass the buck to the Justice Department.

The FCC's brief is just as confusing as its Report in its cursory treatment of the issue of network dominance. Thus, the brief claims (p. 21) that PTAR was only intended to reduce network dominance over affiliated stations and that it has given affiliates more independence during prime time.* But PTAR was part of a pervasive regulatory scheme also designed to foster the health of independent producers vis-a-vis the networks.** Moreover, the FCC's Report contradicts its brief. The Report found that because of PTAR there was "greater carriage of network programs [by affiliates] during network prime time through decline in station preemptions and non-clearances" (¶ 23). As for access time, the FCC's brief glibly asserts (p. 21) that network O&O stations do not control the fate of access shows. But the leading access producers, NAITPD, the Pearce Report and the record all confirm that those powerful stations are the dominant influence in access for the rest of the nation.

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* It notes (p. 21) that "there are no affiliates now beseeching this Court to strike down the rule." But that is because PTAR is a financial bonanza for them, with cheap game shows and double commercials. The FCC also refers (p. 21) to the "resistance of NBC affiliates to carrying a proposed additional Saturday night program" last year. But that was a public affairs program, the very type the FCC now wants to stimulate.

** See quotations from the FCC's 1970 Report in our principal brief, pp. 49-50.

The FCC's brief (p. 21) also claims that the Commission was justified in refusing to conclude that PTAR had increased network dominance over producers. But the FCC's Report found that PTAR did indeed increase such dominance over producers but alleged that it could not measure precisely "how much" (¶ 23). The Justice Department (p. 3) now also agrees that "apparently their [the networks'] power has [been] strengthened vis-a-vis producers" by PTAR -- a view shared by all the disinterested economists (see our principal brief, pp. 51-53).*

NBC's reply comments, now submitted as an exhibit to its brief, were rejected by the FCC's Report (¶ 23), which found that PTAR had increased network dominance over producers and others.

In short, the FCC -- both in its present brief and Report -- refuses to deal with the problem of network dominance and PTAR's aggravation of that evil. The FCC was not always so timid. When it first announced PTAR II in late 1973, the FCC reportedly was about to commence a simultaneous investigation of the networks based in part on the anti-competitive findings and recommendations of the Pearce Report.** But, according to

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* The suggestion by the Justice Department (p. 3) that PTAR was not intended to foster the health of independent producers if they ever dealt with a network is contrary to the FCC's stated goals in passing PTAR in 1970 (23 F.C.C.2d 382, 387, 388, 398, as described in our principal brief, pp. 49-50).

** The Wall Street Journal, December 3, 1973, p. 2; Broadcasting, December 3, 1973; December 10, 1973, pp. 5, 33; Variety, December 5, 1973, December 12, 1973, p. 35; Television Digest, December 3, 1973.

the trade press, network pressures and other factors stifled that investigation.*

Now, the FCC ducks its responsibilities under the Communications Act and continues a rule that increases network dominance contrary to its intent and contrary to Mt. Mansfield and NAITPD. The networks' support of PTAR should have given the FCC more than some cause for concern. It obviously did not. On the contrary, the Commission inexplicably justifies continuing PTAR because it produces "greater profitability" for at least one of the networks (¶ 17). The other two networks apparently also share in the windfall from what was supposed to be an anti-network rule.

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* The Wall Street Journal, December 21, 1973; Daily Variety, December 24, 1973, p. 1; The Hollywood Reporter, December 24, 1973, p. 1.

## CONCLUSION

One thing is crystal clear from the welter of arguments on this appeal: The FCC, dissatisfied with PTAR, would never pass it again but has become its captive. Commissioner Robinson's dissent reveals that "at one time or another a majority of my colleagues have expressed dislike for the access rule" (pp. 6-7). That is apparent from the bizarre history of PTAR:

-- In 1972, barely two years after passing PTAR, the FCC found it necessary to take the extraordinary step of issuing a rule-making notice to consider its repeal.

-- In 1974, the FCC practically repealed PTAR (reducing it from 14 to 6 half hours) because it had so drastically decreased diversity of choices for viewers. Indeed, two of the five Commissioners then sitting (former Chairman Burch and Commissioner Reid) favored total repeal and a third (present Chairman Wiley) indicated misgivings.

-- In 1975, three of the seven Commissioners openly indicated a strong preference for total repeal -- Commissioner Robinson in his dissent and Chairman Wiley and Commissioner Reid in reluctant concurring statements. And the other four Commissioners would only

continue PTAR by adding the illegal program classification system.

The Chairman has been particularly outspoken in public about PTAR and its defects:

> "[Chairman] Wiley told Daily Variety last week, for example, that the antiprogramming concern among the seven [Commissioners] had swelled tremendously because of the prime time access debate now pending--so much so that he wouldn't be surprised if the seven vote to repeal the rule entirely next month." Daily Variety, October 3, 1974, p. 11
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> * * *
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> "Chairman Wiley expressed confidence latest version of rule would withstand court challenge. But he also made it clear he has gone as far as he can in defending rule. 'If the rule does not survive a court appeal,' he threatened last week, 'look for repeal'". Broadcasting, January 20, 1975, p. 5
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> "'I would prefer any alternative to the Primetime Access Rule,' Wiley said. He thinks that the concept brings the FCC too closely into the area of program judgment." Daily Variety, February 11, 1975, p. 19.

Repeal, not remand, is now required because the basic PTAR has proven to be unconstitutional and the FCC's attempts to salvage the rule (the new program classification system)

is a *per se* violation of the First Amendment.

Respectfully submitted,

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Dated: New York, New York
March 4, 1975

# APPENDIX A

## FIVE SEASONS OF PTAR: A STEADY DETERIORATION OF DIVERSITY

The first access season (1971-72): The FCC now suggests (¶ 18) that the first season was atypical because the off-network and motion picture bans were not yet in formal effect. But there was 77% compliance in the first season with all aspects of PTAR even though those two provisions were not yet legally operative (¶ 18 and A 113). And producers like Westinghouse, NAITPD's founder (Winters/Rosen) and Metromedia did in fact make investments in a variety of non-game shows for access periods in the first year (Primus, Story Theatre, Half of the George Kirby Show, Street People, Norman Corwin Presents, David Frost Revue, On the Buses, Doctor In The House, Rollin' on the River) -- programs which some parties viewed as "innovative" (37 F.C.C. 2d 900, 903). But stations preferred the cheaper access game shows (which increased from 11% to 23% in the first access year) and all of the foregoing non-game shows were promptly discontinued.*

The second access year (1972-73): Since program plans for the second access season were made in the winter

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* All percentages herein are based on the chart in our principal brief (p. 3), the accuracy of which was accepted by the FCC (44 F.C.C. 2d 1081, 1153).

and spring of 1972 -- long before the Commission's October 1972 Notice of Rule-Making -- there was surely stability in the second access season. Thus, petitioner Frank admits: "Access time was then thought to be on a reasonably stable footing and was assumed by many in the industry to be a permanent part of our broadcast structure."* Yet, even with this stability, Westinghouse (the inventor of PTAR) abandoned access production, conceding that it decreased diversity (Tr. 486-87). Game shows in the second year increased to 49%. Comedies and dramas fell to 2% and 17%.

The third access year (1973-74): This season was marked by the advent of two new non-game shows, Ozzie's Girls and Dusty's Trail, which the FCC's 1974 Report hoped would be harbingers indicating that stations would not always prefer the cheaper game shows (44 F.C.C. 2d 1081, 1138). But those two shows did not survive the blitz of the game shows and were discontinued.** Games rose to 55% in the third access year. Dramas fell to 12%, comedies were 7%.

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* Comments of Frank before FCC, September 20, 1974, p. 80.

** Metromedia now concedes that its investment in Dusty's Trails was "beyond what prudent business judgment would or should have dictated" (A 521). And ABC, agreeing that the first-run syndication access market cannot support "production resources sufficient to attract a massive audience for dramas and comedies," recently conceded: "We tried Ozzie's Girls and Salty the Sea Lion in prime time access and they just didn't make it." Broadcasting, February 10, 1975, p. 38.

The fourth access year (1974-75): PTAR II was in de facto effect for more than six months (November 1973 until this Court's decision in the NAITPD case in June 1974). Yet, plans under PTAR II led to an increase in game shows to 66% and a decline in dramas and comedies to 5% and 0.5%. Moreover, the Court's unexpected one-year stay of PTAR II in June 1974 gave stations an unusual opportunity to use some of the restored access time for local shows geared to meet community interests. But local shows did not increase at all (A 133 and 418). And local shows geared to minority audiences amounted to less than 1/2 of 1% (A 440-43).

The fifth access year (1975-76): Recently announced plans reveal the contours for next fall's access season -- still more game shows.* ABC, NBC and Westinghouse, each owning five stations in the nation's largest markets, have acknowledged this. Thus, Westinghouse recently stated "animal and game shows are still the cheapest form of access programming."** NBC recently stated that "we don't program any dramatic shows or situation comedies in prime access" because "the syndicators can't come up with the production resources sufficient to attract a mass audience."*** And

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* Broadcasting, February 10, 1975, pp. 38, 42 ; February 17, pp. 30-31; Daily Variety, February 12, 1975, p. 52.

** Broadcasting, February 10, 1975, p. 42.

*** Id., p. 38.

ABC, agreeing with NBC's assessment, recently announced that it will fill the bulk of the access time on its owned stations next season with extra episodes of current daytime network stripped games -- Let's Make A Deal (two episodes in access), Hollywood Squares (two episodes in access), Celebrity Sweepstakes, High Rollers, Gambit and Match Game.* ABC stated that it had little hope for drama or comedy in access and may discontinue its weekly one half hour children's access program.** ABC's program buyer for its five stations reportedly stated that he plans to avoid "cerebral-type" games in preference for "zany, action-oriented flashing-lights show, the Price Is Right and Let's Make A Deal."***

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* Broadcasting, February 10, 1975, p. 38; February 17, pp. 30-31.

** Broadcasting, February 10, 1975, p. 38.

*** Broadcasting, February 10, 1975, p. 38. Chuck Barris, a producer of game shows distributed by petitioner Frank, stated as follows about such programs: "... 'These shows bring out the worst in human beings, and reduce them to a state that isn't very attractive to see. We make a strong appeal to the greed in them. They agonize, they cry, they hyperventilate. And we show all that .... It does not bother me that we show it, because I'm hypocritical and greedy enough myself to want to make money out of it. If I felt strongly enough about it--which I don't--I'd take my shows off the air.' Then he added, grinning: 'Somebody recently called me The King of Slob Culture.'" (TV Guide, August 10, 1974, reproduced at A 513)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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|---|---|
| NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS, et al., Petitioners, -against- FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents, NATIONAL BROADCASTING COMPANY, INC. et al. Intervenors. | Nos. 75-4021, 75-4024, 75-4025, 75-4026, 75-4036 AFFIDAVIT OF SERVICE |

STATE OF NEW YORK )
)ss.:
COUNTY OF NEW YORK )

MOSES SILVERMAN, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at 233 East 59th Street, New York, New York.

On March 4, 1975, I served two copies of the attached reply brief on:

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Said service was made by depositing true copies of the attached reply brief, enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Moses Silverman

Sworn to before me this
4th day of March, 1975.

Notary Public

DOROTHY A. COX
Notary Public, State of New York
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Qualified in Queens County
Commission Expires March 30, 1976